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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

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Wireless Telecommunications Bureau Requests Comment on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to *Fresno Mobile Radio, Inc. v. FCC*	)	**PR Docket No. 93-144**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF CHADMOORE WIRELESS GROUP, INC.

1. Chadmoore Wireless Group, Inc. ("Chadmoore") hereby submits these comments regarding the construction requirements that the Federal Communications Commission ("Commission" or "FCC") should afford 800 MHz Specialized Mobile Radio ("SMR") commercial licensees that are part of a wide area system ("Wide-Area Licensees"). It is Chadmoore's position that the *Fresno Remand*[1] combined with Congressional directive, requires the Commission to provide Wide-Area Licensees with the same build out latitude it gave to the Economic Area ("EA") 800 MHz Licensees ("EA Licensees") that obtained their SMR licenses by auction. In addition, the Commission must reinstate any wide-area licenses that were canceled as a result of revocation of extended implementation authority ("EIA") or the Commission's failure to grant an EIA, because to do otherwise would treat similarly situated Wide-Area Licensees differently, contrary to the mandate of the *Fresno Remand* court.

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[1] *Fresno Mobile Radio, Inc., et al., v. Federal Communications Commission and United States of America; Nextel Communications, Inc., Intervenor,* 14 C.R. 1287 (D.C.Cir. 1998) ("*Fresno Remand*").

Background

2. In 1993, the Commission established a policy whereby existing SMR licensees were granted EIA, which allowed them additional time to construct their systems.[2] This authority was granted either by waiver of the Commission's construction and loading rules,[3] or by application of the extended implementation provisions of Section 90.629 of the Rules.[4] The Commission extended many construction deadlines in order to promote the rapid deployment of wide-area SMR facilities. However, the policy changed when, in December of 1995, the Commission was granted authority to auction spectrum and award licenses to the highest bidder, and the Commission adopted rules looking toward competitive bidding to award spectrum licenses.[5] Included in the rule changes was a freeze on the acceptance of new requests for EIAs under Section 90.629, along with a requirement that any current licensee wishing to retain its EIA make a rejustification showing consisting of (1) the duration of its current EIA, (2) a copy of its

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[2] *See, Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods*, Report and Order, 8 FCC Rcd 3975 (1993).

[3] *See e.g., Fleet Call, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 1533, recon. dismissed, 6 FCC Rcd 6989 (1991); *Letter from Ralph A. Haller, Chief, Private Radio Bureau to David Weisman*, DA 92-1734, 8 FCC Rcd 143 (1993).

[4] 47 C.F.R. § 90.629. *See, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, Further Notice of Proposed Rulemaking, 10 FCC Rcd 7970 at ¶47 (1995) ("*Further Notice*").

[5] *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd. 1463 (1995) ("*800 MHz SMR Report and Order*").

implementation plan, (3) a showing of compliance with Section 90.629, and (4) certification that the facilities covered by the EIA were fully constructed and that service to subscribers had begun.[6] If a licensee's showing was approved by the Wireless Telecommunications Bureau, the licensee was afforded two years or the remainder of its current EIA, whichever was shorter, to finish construction. If the showing was not approved, or no showing was made, the licensee had only six months from the date of the *800 MHz SMR Report and Order* to complete construction of the facilities. Failure to construct within the allotted time resulted in the automatic license cancellation.[7]

3. Prior to the rule change, Chadmoore had entered into several management and option agreements with various SMR licensees, which provided Chadmoore the opportunity to manage and an option to purchase the SMR licenses once the stations were constructed. Chadmoore entered into such agreements with the licensees of nearly 2,000 conventional licenses throughout twenty-six states ("Conventional Licensees"). Chadmoore and the Conventional Licensees planned to develop a wide area SMR system across these twenty-six states; however, because of the expense and complexity associated with creating such a system, it was necessary for Chadmoore to file, on behalf of the Conventional Licensees, applications for EIA pursuant to Section 90.629, requesting an additional three years to construct. The Commission dismissed these applications. Specifically, the Commission found that application of Section 90.629 was not in the public interest in this case because "granting the requests for extended

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[6] *800 MHz SMR Report and Order* at ¶ 111.

[7] *Id.* at ¶ 112.

implementation authority currently pending. . . would conflict with [the FCC's] goal of uniformly implementing wide-area licensing."[8] Thus although the rule was not scheduled to sunset for another 90 days, the Commission in effect accelerated the sunset deadline in Chadmoore's case and denied its EIA request.[9] Although the Conventional Licensees constructed as much as they could in the six months remaining to them, many of their licenses were automatically canceled because they were denied EIA.

4. Chadmoore also entered into management and option agreements with the Roberts Group,[10] which involved licenses for a total of some 5,554 trunked SMR channels across the United States. The Roberts Group proposed to construct an

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[8] *800 MHz Report and Order* at 1524.

[9] Chadmoore appealed the denial of its application for an EI period, arguing that the Commission acted arbitrarily and capriciously when it retroactively applied new rules to a pending application. The court held that the Commission's actions were neither arbitrary nor capricious, because the Commission was entitled to take into account the adverse impact that a grant of Chadmoore's application would have had on the Commission's new policy regarding the construction of wide-area SMR systems. *Chadmoore Communications, Inc. v. FCC*, 113 F.2d 235 (D.C. Cir., 1997) ("*Chadmoore*"). The instant proceeding is easily distinguished from *Chadmoore*, because *Chadmoore* focused on the retroactive application of rule changes and the impact large scale projects versus small scale projects. In the instant proceeding, the Commission must address whether SMR licensees, all of whom seek to provide services on a large scale (*i.e.*, Wide-Area Licensees and EA-Licensees) and are thus more similarly situated than the parties in *Chadmoore*, should be treated similarly with respect to construction deadlines.

[10] The Roberts Licensees include Harrowby TV, Inc., USITV, Inc., MTI, U.S., Inc., MTI TV, Inc., Ooh Baby! Productions, Inc., Ashcroft ITV, Inc., Italia, Inc., O'Neil TV, Inc., HGTV, Inc., SGTV, Inc., RMTV, Inc., JMTV, Inc., Joan Moore, Inc., Elizabeth Martone, Inc., Bill Roberts, Inc., Mary Francis Martone, Inc., Shelly Curttright, Inc., Maureen Widing, Inc., Dru Jenkinson, Inc., Joseph Marton, Inc., Jana Green, Inc., Kathy Recos, Inc., Jeff Roberts, Inc., Patricia Fleming, Inc., Tad Dobbs, Inc., Wes Dalton, Inc., Steve Dowdy, Inc., David X. Crossed, Inc., Scott Mayer, Inc., Hunter ITV, Inc., Tenth Street TV, Inc., BBTV, Inc., JBTV, Inc., and Lynn Adams, Inc. ("Roberts Group").

integrated nationwide SMR system, providing coverage to 200 cities in 46 states as well as Puerto Rico and the U.S. Virgin Islands. In 1995, the Roberts Group filed a joint request for EIA requesting an additional five years to construct these facilities. On March 3, 1995, the Roberts Group was granted an EIA pursuant to Section 90.629, affording the group until March 3, 2000, to complete construction of its planned wide-area system. Under the terms of the EIA, the group's first construction benchmarks did not have to be met until December of 1995.

5. Just a few months after the Roberts Group was awarded its EIA, the Commission changed its rules and required licensees with EIA to rejustify the need for EIA. A total of 37 licensees filed re-justification showings.[11] Of these 37 licensees, the Commission found that 27 had justified an additional two year construction period, or the remainder of the EIA, whichever was shorter, to complete construction.[12] The remaining 10 licensees, including the Roberts Group, had proposed to construct digital systems from the start rather than construct analog systems and then switch to digital. The Commission found that only two of these 10 licensees had justified continuation of EIA, because only two had begun constructing their systems. The Roberts Group was not one of the two that had begun construction, because it had not yet reached the first

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[11] Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Order, 13 FCC Rcd. 1533 (WTB 1997) ("*WTB Order*").

[12] *WTB Order* at 9. These twenty-seven licensees sought EIA in order to convert their systems from analog to digital systems, and the Commission found that they had made substantial steps toward converting their systems to digital.

construction benchmark established under its EIA and thus had reason to believe it was not required to do so. Nevertheless, the Roberts Group and the remaining licensees were given only six months to complete construction or face automatic cancellation of their licenses.[13] The Roberts Group constructed what it could in the shortened six months; and the remaining unconstructed licenses were automatically canceled.[14]

6. Had the Roberts Group and the Conventional Licensees been afforded the same construction deadlines that EA Licensees were afforded, both sets of licensees would have successfully constructed all of their systems and would be providing valuable dispatch services to many communities across the country, services for which there is now an unmet, pent-up demand. The Commission's disparate treatment of these entities resulted in the automatic cancellation of many of their licenses which cannot be justified under the *Fresno Remand* decision.

Incumbent Wide-Area Licensees Are Substantially Similar
to EA Licensees and Must Be Subject to the Same Regulatory Requirements.

7. In 1993, Congress adopted Section 332 of the Communications Act, which required the FCC to classify all mobile radio services as either "commercial" or "private."[15] For services that were once private and were changed to commercial, the

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[13] *WTB Order* at ¶ 12. Upon cancellation of an incumbent wide-area license, the spectrum was re-assigned to the EA Licensee operating in that particular EA.

[14] The Roberts Group filed a petition for reconsideration of the Commission's denial of its rejustification showing arguing that it had not constructed any facilities because it had not yet met the first benchmark under its existing EIA. The Commission denied reconsideration. The fact that the Roberts Group failed to appeal the Commission's decision is not of significance here, because no law requires an applicant to appeal an agency decision to preserve its Constitutional right to equal protection under the law.

[15] 47 U.S.C. § 332(c).

Commission was required to promulgate "technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar [commercial] services."[16] The statute required the Commission to identify which private services were "substantially similar" to common carrier services.[17] According to the Commission, "Congress created CMRS as a new classification of mobile services to ensure that similar mobile services are accorded similar regulatory treatment."[18] The Commission concluded that "services should be considered substantially similar if they compete[19] or have the reasonable potential, broadly defined, to compete in meeting the needs and demands of consumers."[20] Specifically, the Commission found that 800 MHz SMR licensees compete or have the potential to compete with wide-area commercial mobile radio service ("CMRS") providers.[21] The

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[16] Pub. L. No. 103-66 § 6002(d)(3)(B), 107 Stat. 312 (1993).

[17] *See, Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool*, Third Report and Order, 9 FCC Rcd 7988 at ¶ 22 (1994) ("*CMRS Third Report and Order*").

[18] *CMRS Third Report and Order* at ¶ 22, *citing Implementation of Sections 3(n) an 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Further Notice of Proposed Rulemaking, 9 FCC Rcd 2826 at ¶ 13 (1994) ("*Further Notice*").

[19] *Id.* at ¶ 24, *citing Further Notice* at ¶ 13.

[20] *Id.* at ¶ 23.

[21] *Id.* at ¶ 94.

Commission specifically rejected arguments that "substantial similarity should be judged by technical differences among services."[22]

8. In its Public Notice requesting comments on the *Fresno Remand*, the Commission asks that "[p]arties who believe that construction requirements should be similar to geographic area licensees take into account the differences in the way the Commission licensed wide-area 800 MHz systems (*i.e.*, by site-specific licensing and geographic area licenses) when addressing what should be the appropriate requirements for Wide-Area Licensees."[23] Under the Commission's own test of substantial similarity, however, the licensing scheme, as opposed to the method of operation, of a particular service is not relevant to whether that service are substantially similar. In fact, making distinctions based the licensing scheme directly contradicts the Commission's own test of when services are substantially similar.[24] Thus the way in which licenses were issued should not be an element in determining whether an 800 MHz Wide-Area Licensee is substantially similar to an 800 MHz EA Licensee.

9. Following the Commission's test of substantial similarity, there is no rational basis for treating incumbent Wide-Area Licensees differently from EA Licensees or other geographic area licensees. To the contrary, Wide-Area Licensees and EA Licensees directly compete with one other and therefore are substantially similar. In light of this

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[22] *Id.* at ¶ 28.

[23] *Wireless Telecommunications Bureau Requests Comment on the Construction Requirements for Commercial Wide-Area 800 MHz Licensees Pursuant to Fresno Mobile Radio, Inc. v. FCC*, Public Notice, DA 99-974 (May 21, 1999).

[24] *CMRS Third Report and Order* at ¶ 28.

direct competition, the Commission cannot rationally grant EA Licensees relief from short construction deadlines without affording Wide-Area Licensees the same relief.

The Commission Must Retroactively Reinstate Licenses Canceled After Adoption of the *800 MHz SMR Report and Order*.

10. If the Commission gives existing Wide-Area Licensees, as it should, relaxed construction deadlines, it must also retroactively reinstate the licenses of those Wide-Area Licensees who would not have lost their licenses but for the unjustified shortening of construction deadlines. The Commission cannot treat Wide-Area Licensees such as Southern Company ("Southern") differently from the way it treats other Wide-Area Licensees, such as the Conventional Licensees, the Roberts Group, and Chadmoore, who lost their licenses, because they are all substantially similar and therefore must be afforded the same treatment.[25] The Commission must not further compound the error of improper license cancellation by once again treating similarly situated licensees differently. It must reinstate the licenses of the Conventional Licensees and the Roberts Group and treat them the same as it treats Southern, by granting the same relaxed construction deadlines it must now afford Southern.

[25] Southern was among the 27 licensees who had an existing EIA shortened as a result of the Commission's desire to auction spectrum to EA Licensees. Unlike the Roberts Group, Southern rejustified its existing EIA by showing that it had taken substantial steps toward converting its existing analog system to digital and therefore obtained an additional two years to construct its facilities. In light of the substantial public demand for analog facilities, conversion to digital does not appear to be a proper reason for distinguishing among licensees; but regardless of that aspect, the Roberts Group, Southern, and the Conventional Licensees are all Wide-Area Licensees entitled to similar treatment, but not all were granted the same relaxed construction requirements that EA Licensees received.

11. It must be noted that retroactive reinstatement of Chadmoore's canceled wide-area licenses would not be unduly burdensome to EA Licensees, as they clearly should have known at the time of the auction that many issues, including construction deadlines, were still being adjudicated in the courts, and that certain channels might not be available for their use.[26] Bidders should have adjusted their bids accordingly.

Conclusion

12. The Commission may not treat Wide-Area Licensees differently from EA Licensees, because they are substantially similarly situated, and the Commission is statutorily and now judicially required to treat providers of substantially similar services comparably. Comparable treatment includes the imposition of comparable construction requirements. Compliance with law now requires that the Wide-Area Licensees be granted the same relaxed construction deadlines the Commission has afforded EA-Licensees, and the wide area licenses that were improperly canceled must be reinstated. Wide-Area Licensees should be deemed to have met construction requirements if they provide service to one-third of the population in their service area within three years of reinstatement and to two-thirds of the population within five years.

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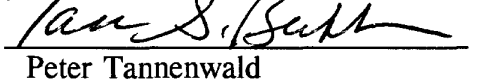
Respectfully submitted,



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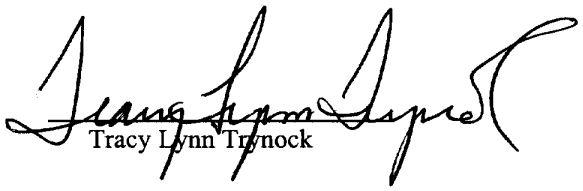
July 12, 1999

[26] *See e.g., Wireless Telecommunications Bureau Identifies Petitions and Applications Affecting 80 MHz Specialized Mobile Radio Upper Band Spectrum*, Public Notice, DA 97-1901 (1997).

CERTIFICATE OF SERVICE

I, Tracy Lynn Trynock, hereby certify that on this 12th day of July, 1999, a copy of the foregoing "Comments of Chadmoore Wireless Group, Inc." has been served by first-class United States mail, postage pre-paid, or by hand delivery upon the following:



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